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No. _____

In The

Supreme Court of the United States

WESTSIDE QUIK SHOP, INC., et al.,

Petitioners,

v.

ROBERT M. STEWART, et al.,

Respondents.

On Petition For Writ Of Certiorari To The South Carolina Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a State Legislature may, by statute, designate a class of property, the ownership and use of which has been legal within the State for decades and where the State has taken specific action to require expenditures and investments to maintain that property, as illegal "contraband" and thereby avoid the constitutional duty to pay just compensation for the taking of such property even though this Court held in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1031 (1992) (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980)), that a " 'State, by ipse dixit, may not transform private property into public property without compensation' "?

2. Whether the court below erred in holding that reasonable investment-backed expectations are part of every takings case, even those cases in which the property owner has shown that he has been deprived of all economically beneficial use of his property?

PARTIES TO THE PROCEEDING

Petitioners Westside Quik Shop, Inc., Phelix C. Byrd, Ree M. Byrd, and Winner's Pot of Gold Hot Spot, Inc. are owners and lessees of video gaming machines which they operate in convenience stores and in buildings constructed specifically for video gaming. Petitioners Westside Quik Shop, Inc. and Winner's Pot of Gold Hot Spot, Inc. are both corporations in good standing under South Carolina law and hereby declare, pursuant to Rule 29.6 of this Court, that neither of these corporations have parent companies or any wholly owned subsidiaries. Petitioners were respondents in the South Carolina Supreme Court and plaintiffs in the trial court. The respondents, Robert M. Stewart and Charles M. Condon, were petitioners in the South Carolina Supreme Court and defendants in the trial court.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Westside Quik Shop, Inc., Phelix C. Byrd, Ree M. Byrd, and Winner's Pot of Gold Hot Spot, Inc. respectfully petition this Court for a writ of certiorari to review the judgment of the South Carolina Supreme Court in this case.

OPINIONS BELOW

The opinion of the South Carolina Supreme Court from which review is sought is *Westside Quik Shop, Inc. v. Stewart*, No. 25158, 2000 WL 823346 at *1 (S.C. June 21, 2000) (Appendix to Petition for Writ of Certiorari ("App.") at 1A-11A). This Court denied a motion for stay from that decision on July 6, 2000.

JURISDICTION

The South Carolina Supreme Court granted respondents' request to hear this in its original jurisdiction on June 6, 2000 (App. at 12A) and entered its decision on June 21, 2000. (App. at 1A-11A). Petitioners' applications for stay from the decision below were denied by the South Carolina Supreme Court on June 30, 2000 and by this Court on July 6, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> "No person . . . shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. CONST. amend. V.

The Fourteenth Amendment to the United States Constitution provides:

> "Section 1 . . . nor shall any State deprive any person of life, liberty, or property without due process of law . . . "

U.S. CONST. amend. XIV.

42 U.S.C. § 1983 provides in pertinent part:

> "Every person who, under color of any statute, ordinance, regulation . . . subjects, causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . . "

42 U.S.C. § 1983 (1999).

STATEMENT OF THE CASE

Since their invention in the mid-1970s, video gaming machines have been legal in South Carolina. Although

possession and use of many other types of gambling devices is not permitted, in 1975 the state legislature specifically exempted video gaming devices from that prohibition. *See* S.C. Code Ann. § 16-19-60 (Law Co-op. 1999).[1] Under South Carolina law, the use of these video machines for gambling was entirely lawful, provided the payouts were made by a human attendant rather than by the machine itself. *South Carolina v. Blackmon*, 403 S.E.2d 660 (S.C. 1991). In consequence, plaintiffs and many other businesses invested substantial sums over the years to purchase video gaming machines, and to build businesses and buildings where they were lawfully used and housed.

A typical example is plaintiff Westside Quik Shop, Inc. In 1978, Ronnie White and Michael Wright leased an abandoned gas station in Greenville, South Carolina, and, for $15,000, converted it into one of the town's first convenience stores. Affidavit of Ronald James White at ¶ 4 (App. at 40A). They incorporated their business the next year as plaintiff Westside Quik Shop, Inc. (hereinafter "Westside") and in 1981, bought the gas station and land on which it stood. *Id.* at ¶¶ 1, 5 (App. at 39A-41A). For the past 22 years, the business has supported the Wright and White families, while providing a neighborhood market for residents of the community, many of whom lack transportation to get to supermarkets and shopping malls. *Id.* at ¶ 4 (App. at 40A). In 1997, Westside purchased a second Greenville convenience store, Dave's

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[1] The opinion below erroneously stated that this legislation was enacted in 1982. *Westside Quik Shop, Inc. v. Stewart*, No. 25158, 2000 WL 823346 at *1 (S.C. June 21, 2000) (App. at 2A).

Grocery. *Id.* at ¶ 9 (App. at 42A). Neither of these stores makes a profit on food and gasoline; they are economically viable only because of the five video poker machines at the original Westside location and the three located at Dave's. *Id.* at ¶¶ 5, 10 (App. at 40A-41A, 42A-43A); *see also* Affidavit of Gary Clardy (App. at 32A-35A). As Mr. White states: "Few of our customers spend more than a couple of dollars on the machines when they come in to purchase goods, but it all adds up to provide a profit on a business that would otherwise lose money." *Id.* at ¶ 5 (App. at 40A-41A).

Westside placed its first few video poker machines in its original Greenville store in 1981. *Id.* (App. at 40A-41A). Over the years, Westside acquired various machines, licensing them and operating them in full conformity with South Carolina law. *Id.* at ¶¶ 5, 6, 9 (App. at 40A-41A, 42A). Then, in 1998, the State announced that it would require all such machines to be electronically connected by modem to a central state computer, requiring Westside to purchase all new machines with this computer-age technology. *Id.* at ¶ 11 (App. at 43A). As a result, within the last two years Westside has invested $144,000 in the purchase of 18 machines (and has paid an additional $80,000 in license fees). *Id.* at ¶¶ 11, 12 (App. at 43A). Mr. White testified that Westside made this investment in new machines with borrowed money, and only after a 1994 county-wide referendum in which Greenville County voted to continue to allow video poker in the community. *Id.* at ¶¶ 7, 8, 11 (App. at 41A-42A).

Similarly, plaintiffs Phelix and Ree Byrd had been in the video gaming business since 1992. Affidavit of Phelix C. Byrd at ¶ 5 (App. at 14A). In 1998, they incorporated

their business as plaintiff Winner's Pot of Gold Hot Spot, Inc. (hereinafter "Winner's"), which until July 1 operated four video gaming venues. *Id.* at ¶¶ 6, 8 (App. at 15A). About a year ago, Mr. and Mrs. Byrd completed construction of two single-purpose buildings to accommodate their business, at a total cost of over $1.3 million. *Id.* at ¶¶ 11, 12 (App. at 16A-17A). They also renovated two leased properties, at a total cost of $120,000, and have several years left to run on the two leases. *Id.* at ¶ 13 (App. at 17A). Until July 1 of this year, when video gaming became illegal, Winner's employed 80 people, with a payroll of $20,000 per week, including Mr. and Mrs. Byrd themselves. *Id.* at ¶ 7 (App. at 15A). Since video gaming was their only source of income, the corporation and Mr. and Mrs. Byrd have been entirely wiped out by respondents' closure of their business under Act 125, and their buildings sit idle and useless.[2] *See* Affidavit of A. Crawford Clarkson (App. at 29A-31A); Affidavit of Fred Seale (App. at 36A-38A).

On July 1, 1999 the South Carolina legislature passed Act 125, reclassifying video gaming machines such as plaintiffs' as illegal contraband effective July 1, 2000.[3] Act

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[2] Although their business was profitable during 1999, most of those profits went into construction of the two buildings.

[3] To be more precise, the legislature sought to put the issue before the electorate as a referendum, but the court below struck down the referendum process as an unlawful delegation of the lawmaking power to the electorate, then went on to determine that the remainder of the statute outlawed video gaming. *See Joytime Distributors & Amusement Co. v. State of South Carolina*, No. 25007, 1999 WL 969280 at *1 (S.C. Oct. 14, 1999), *cert. denied*, 120 S. Ct. 1719 (2000).

125, 1999 S.C. Acts 1319. As respondent, South Carolina Attorney General Condon, announced:

> Just after the stroke of midnight June 30, 2000, a video gambling machine will be no different in terms of its illegality than a kilo of cocaine. . . . Therefore, as of July 1, these machines will be contraband, subject to confiscation and destruction and their possession will be a criminal offense, subject to arrest and prosecution. . . . [4]

Letter from Charles M. Condon to Robert M. Stewart at 7 (May 8, 2000).

On May 25, 2000, petitioners filed an action in the Common Pleas Court for Greenville County, South Carolina, Thirteenth Judicial Circuit, seeking a temporary injunction (together with permanent injunctive and declaratory relief) against the enforcement of Act 125, set to take effect on June 30, 2000. Petitioners alleged that the application of Act 125 would result in the taking of their

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[4] The Condon letter also stated:

> With respect to the criminal aspect of § 12-21-2710, the statute makes it 'unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State' video gambling machines as of July 1, 2000. . . . Thus, anyone possessing the illegal video gambling machines on or after July 1, 2000 would be subject to criminal prosecution pursuant to § 12-21-2710.

Letter from Charles M. Condon to Robert M. Stewart at 5 (May 8, 2000).

private property rights in violation of the Just Compensation Clauses of the Fifth Amendment and Article I, Section 13 of the South Carolina Constitution and would also violate 42 U.S.C. § 1983.

Instead of answering the complaint, the next day respondents petitioned the Supreme Court of South Carolina to remove the case to that court's original jurisdiction and on June 6, 2000, the removal petition was granted over petitioners' strenuous objections. By its June 6, 2000 Order, the South Carolina Supreme Court required the parties to file opening briefs on June 12, 2000, and reply briefs on June 16, 2000. The case was submitted for decision on June 20, 2000, and on the next morning, June 21, 2000, the South Carolina Supreme Court issued its decision in *Westside Quik Shop, Inc. v. Stewart*, No. 25158, 2000 WL 823346 at *1 (S.C. June 21, 2000) (App. at 1A-11A), finding against petitioners' application for a temporary injunction and rendering a decision on the merits of petitioners' underlying lawsuit without any hearing or any notice to petitioners that the merits of the lawsuit were to be decided.

On June 30, 2000, petitioners submitted an Emergency Motion for Stay to the court below, pending review by this Court, and on the same day, the South Carolina Supreme Court issued an Order denying the stay application. On July 5, 2000, petitioners sought a stay from this Court that was denied on July 6, 2000.

The facts of this case, as presented for review by this Court, are pristine and unchallenged. Since respondents never filed an Answer to the Complaint nor any affidavit, the only facts in the record are the allegations of the

Complaint and the sworn testimony in affidavits submitted by plaintiffs. Hence, the case presents a stark issue of law, unencumbered by any factual dispute. Those uncontroverted facts establish that Act 125 as applied to petitioners has resulted in a total taking of their property rights by shutting down their businesses, forfeiting their video gaming machines, and destroying all beneficial and productive use of their real property.

REASONS FOR GRANTING THE WRIT

The South Carolina Supreme Court has made numerous significant rulings which are in error and which have broad implications for the stability of property ownership. First, the court's refusal to enjoin the State's destruction of petitioners' property rights without payment of just compensation, holding that state legislatures can simply declare a currently disfavored class of property to be illegal contraband and subject to public confiscation without payment of just compensation, presents an important core constitutional issue that has yet to be resolved by this Court. On the one hand, this Court has repeatedly observed that a " 'State, by ipse dixit, may not transform private property into public property without compensation.' " *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1031 (1992) (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980)). On the other hand, this Court has established that where the property is such that "the possession of which, without more, constitutes a crime" such as adulterated food, sawed-off shotguns, narcotics, and smuggled goods, such classes of property can be seized without triggering the

duty to pay just compensation. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965).

This case lies in the middle and is particularly troublesome because it involves a class of property that has been historically encouraged by the State (by specific legislative authority, subsequently approved by the South Carolina Supreme Court), but is now disfavored because of a change in public policy. If left unreviewed, the court's holding that a State can simply declare certain classes of property "contraband" and not require payment of just compensation could have serious consequences for the continued integrity of the Just Compensation Clause. Second, the court below held that "even where [the property owner] is deprived of all economically viable use of his property, an owner must still have reasonable investment-backed expectations to establish a taking." *Westside Quik Shop, Inc. v. Stewart*, No. 25158, 2000 WL 823346 at *4 (S.C. June 21, 2000) (App. at 10A).

The opinion below ignores this Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), holding that when all beneficial use of property is taken, a taking has occurred: "We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Id.* at 1019. The *Westside* decision also conflicts with decisions of other state courts and federal courts of appeals, notably the Federal Circuit Court of Appeals, which have held

that the taking of all economically beneficial use of property is a per se violation of the Fifth Amendment. *See Palm Beach Isles Associates v. United States*, 208 F.3d 1374 (Fed. Cir. 2000), *petition for rehearing or rehearing en banc filed* (May 26, 2000); *Ohio ex rel. Pizza v. Rezcallah*, 702 N.E.2d 81 (Ohio 1998); *Lopes v. City of Peabody*, 629 N.E.2d 1312 (Mass. 1994); *but see Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999), *cert. denied*, 120 S. Ct. 1544 (2000); *Outdoor Graphics, Inc. v. City of Burlington*, 103 F.3d 690 (8th Cir. 1996); *Colorado Department of Health v. The Mill*, 887 P.2d 993 (Colo. 1994), *cert. denied*, 515 U.S. 1159 (1995). That conflict among state courts[5] and among the courts of appeals on a question of federal constitutional law warrants resolution by this Court.

I. The Important Constitutional Issue of How Far a State Can Go in Declaring Property "Illegal Contraband" to Avoid Constitutional Scrutiny Has Not Been Decided By This Court.

This case affords this Court the opportunity to determine when and under what circumstances a State may

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[5] Under decisions of this Court, all federal takings claims involving the state must first be resolved by a state court. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). Under the Tucker Act, 28 U.S.C. § 1491 (1988), all takings claims for money damages against the United States must go to the U.S. Court of Federal Claims and on appeal to the Federal Circuit Court of Appeals. *See Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990). Thus, the conflicts present among state courts and the Federal Circuit Court of Appeal are important because they signify a split of authority in the only forum with jurisdiction to hear these constitutional claims.

deem property "contraband" outside the protections of the Constitution and when such property is entitled to constitutional protection, including protection against uncompensated takings. Even though petitioners' video gaming machines had always been completely legal in South Carolina, and not historically considered illegal contraband within the State, the court below ruled that a State legislature may avoid the constitutional requirement of just compensation by the simple expedient of declaring the property to be "contraband" and requiring uncompensated forfeiture of the property to the State:

> Act No. 125 amends § 12-21-2710 to include the video gaming machines in question which will become subject to forfeiture under § 12-21-2712 as of July 1, 2000. We have already determined that the forfeiture of gaming machines pursuant to these statutes accords with due process requirements. We see no reason to answer this question differently where the forfeiture applies to video gaming machines that until recently were not contraband.

Westside Quik Shop, Inc. v. Stewart, No. 25158, 2000 WL 823346 at *2 (S.C. June 21, 2000) (citations omitted) (App. at 6A-7A).

This holding of the court below conflicts irreconcilably with the holdings of this Court that property rights under the Fifth Amendment are "defined by background principles of law such as state law," (*see Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029-31 (1992); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980)), and may not be defined away by legislative enactment alone:

> We emphasize that to win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common law maxim such as sic utere tuo ut alienum non laedas. As we have said, a "State, by ipse dixit, may not transform private property into public property without compensation."

Lucas, 505 U.S. at 1031 (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980)); *see also Phillips v. Washington Legal Foundation*, 524 U.S. 156, 167-72 (1998) (holding interest on deposits in court or attorney's trust account may not be declared public property ipse dixit). Moreover, the court below created an unprecedented exception to the just compensation guarantee of the Fifth Amendment by holding that the "sacrifice" (i.e., uncompensated taking of private property rights) of property rights may be required if the State legislature deems it in the public interest: "In determining whether the forfeiture of a particular type of property violates due process, we consider the nature of the property, the necessity for its sacrifice, and the extent to which it has heretofore been regarded as within the police power."[6] *Westside Quik Shop, Inc. v. Stewart*, No. 25158, 2000 WL 823346 at *2 (S.C. June 21, 2000) (App. at 7A).

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[6] Later in the opinion, the court below misstated the rule of *Agins v. Tiberon*, 447 U.S. 255, 260 (1980) ("The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land."), as follows: "if the regulation does not deny the owner all economically viable use of his land, it does not constitute a taking if it substantially advances legitimate government

That holding is hopelessly inconsistent with the long line of Fifth Amendment cases decided by this Court. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) ("We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841 (1987) ("The Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization."); *Dolan v. City of Tigard*, 512 U.S. 374, 390-92 (1994) (holding that exactions must be "roughly proportional" to the burden created by the activity).

Indeed, the holding in the instant case flies in the face of this Court's rebuff of an identical effort by the court below to eviscerate the Just Compensation Clause's protection: "The South Carolina Supreme Court's approach would essentially nullify Mahon's affirmation of limits to the noncompensable exercise of the police power. Our cases provide no support for this. . . . " *Lucas*, 505 U.S. at 1026. In short, the legislative label of "contraband," just like the legislative label of "nuisance," should not automatically cancel the rights guaranteed by the just compensation clause of the Fifth Amendment.

At the same time, a separate line of cases has developed the rule that the requirements of the Just Compensation Clause do not apply where the property in

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interests." *Westside Quik Shop, Inc. v. Stewart*, No. 25158, 2000 WL 823346 at *3 (S.C. June 21, 2000) (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)) (App. at 10A).

question is classified as "contraband" subject to forfeiture. As this Court has explained, where "objects the possession of which, without more, constitutes a crime [e.g., adulterated food, sawed-off shotguns, narcotics, and smuggled goods], the government has an obvious remedial interest in removing the items from private circulation, however blameless or unknowing their owners may be." *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965). Applying this rule of contraband, this Court rejected a wife's claim that forfeiture of her one-half interest in the family automobile, which her husband had used for immoral purposes, was not an unconstitutional taking:

> Petitioner also claims that the forfeiture proceeding here in question was a taking of private property for public use in violation of the Takings Clause of the Fifth Amendment, made applicable to the States by the Fourteenth Amendment. But if the forfeiture proceeding here in question did not violate the Fourteenth Amendment, the property in the automobile was transferred by virtue of that proceeding from petitioner to the State. The government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain.

Bennis v. Michigan, 516 U.S. 442, 452-53 (1996), *rehearing denied*, 517 U.S. 1163 (1996).

However, the facility with which a state legislature may evade constitutional protections by the mere expedient of labeling a class of property "contraband," or an

activity involving that property a "vice," has raised concerns among members of this Court. For example, in *Florida v. White*, 526 U.S. 559 (1999), Justice Souter, writing for himself and Justice Breyer, stated:

> I join the Court's opinion subject to a qualification against reading our holding as a general endorsement of warrantless seizures of anything a State chooses to call 'contraband,' whether or not the property happens to be in public when seized. The Fourth Amendment does not concede any talismanic significance to use of the term 'contraband' whenever a legislature may resort to a novel forfeiture sanction in the interest of law enforcement, as legislatures are evincing increasing ingenuity in doing.

Id. at 566-67 (citing *Bennis v. Michigan*, 516 U.S. 442, 458 (1996) (Stevens, J., dissenting); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 81-82 and n.1 (1993) (Thomas, J., concurring in part and dissenting in part) ("In my view, . . . the Court . . . has not always placed sufficient stress upon the protection of individuals' traditional rights in real property . . . [a]nd like the majority, I am disturbed by the breadth of new civil forfeiture statutes.")).

Moreover, as gambling becomes an increasingly popular entertainment in the United States,[7] the extent to

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[7] In 1998, 29% of Americans gambled at casinos at some time, 52% played a lottery, 6% gambled on bingo, and 7% bet on horses. Final Report, National Gambling Impact Study Comm'n at 1-3 & Fig. 1-2 (June 1999). In sum, 125 million Americans gambled in 1998. *Id.* at Appendix I (Personal Statement of Leo T. McCarthy). As of the date of the Commission's report, a total of

which owners of gaming machines and businesses enjoy the protections of the Bill of Rights takes on added significance.[8] As this Court recently stated in holding that liquor retailers are entitled to First Amendment protection:

> The scope of any 'vice' exception to the protection afforded by the First Amendment would be difficult, if not impossible to define. Almost any product that poses some threat to public health or public morals might reasonably be characterized by a state legislature as relating to 'vice activity.' Such characterization, however, is anomalous when applied to products such as alcoholic beverages, lottery tickets, or playing cards, that may be purchased on the open market. The recognition of such an exception would also have the unfortunate consequence of either allowing state legislatures to justify censorship by the simple expedient of placing the 'vice'

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37 states had state-sponsored lotteries (including the District) and lotteries were the most widespread form of gambling in the United States. *Id.* at 2-1. At least seven states had legalized the operation of video poker machines as of the date of the report while 28 states had legally operating casinos. *Id.* at 2-4 – 2-6. Wagering on horse racing was reported legal in 43 states, and 15 states had operating, legal greyhound tracks. *Id.* at 2-11.

[8] This Court has recently underscored the mainstream acceptance of the gaming industry, stating: "Some form of gambling is legal in nearly every State." *Greater New Orleans Broadcasting v. United States*, 527 U.S. 173, 187 n.5 (1999). Indeed, the South Carolina Supreme Court has also recognized that gambling has roots in the customs and mores of South Carolina by finding that, since 1712 (even before the colony became a State in 1788), "gambling in some form has not always been illegal" in South Carolina. *Berkebile v. Outen*, 426 S.E.2d 760, 762 (S.C. 1993).

> label on selected lawful activities, or requiring the federal courts to establish a federal common law of vice.

44 Liquor Mart, Inc. v. Rhode Island, 517 U.S. 484, 514 (1996). This case, thus, squarely poses the parallel question: Does the Fifth Amendment contain a "vice exception" for gaming machines and businesses?

II. By Adding a Reasonable Expectations Element To the Per Se Test Announced By This Court in *Lucas v. South Carolina Coastal Council*, the South Carolina Supreme Court Has Decided an Important Federal Constitutional Issue in Direct Conflict with Relevant Decisions of This Court and of Other Federal Courts of Appeal.

In 1992, this Court held that a per se taking had occurred when a property owner had been deprived of all beneficial and productive use of his property and a court need not engage in the three-factor analysis set forth in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), for determining whether an unconstitutional taking had occurred: "When, however, a regulation that declares 'off-limits' all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992). The court below held in this case, however, that it is free to ignore this per se test and to consider one of the *Penn Central* three factors that this Court previously held was irrelevant when a property owner has been denied all use of his property. That is to say, the court below flatly rejected this Court's holding in

Lucas by stating: "Moreover, even where he is deprived of all economically viable use of his property, an owner must still have reasonable investment-backed expectations to establish a taking." *Westside Quik Shop, Inc. v. Stewart*, No. 25158, 2000 WL 823346 at *4 (S.C. June 21, 2000) (App. at 10A).

Following the *Lucas* decision, two distinct lines of cases have developed. Consistent with *Lucas*, numerous courts have adopted a categorical rule of liability holding that when the property owner has been deprived of all beneficial and productive use of his property, liability for a taking has been established. The integrity of the *Lucas* per se rule was confirmed last term when this Court upheld a Ninth Circuit decision awarding just compensation for the taking of all economically viable use of the landowners' property. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). In *Del Monte Dunes*, the Ninth Circuit explained that "compensation is required where regulations 'leave the owner of land without economically beneficial or productive options for its use.' " *Del Monte Dunes*, 95 F.3d 1422, 1432 (9th Cir. 1996); *see also Dodd v. Hood River County*, 136 F.3d 1219, 1228 (9th Cir. 1998), *cert. denied*, 525 U.S. 923 (1998) ("In *Lucas*, the Supreme Court held that there is a categorical taking when a regulation prohibits all economically beneficial use of land, and no balancing of other factors commonly analyzed in takings law – reasonable investment-backed expectations and legitimate government interest – would be necessary.").

In *Florida Rock Industries v. United States*, 18 F.3d 1560, 1569 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995), the U.S. Court of Appeals for the Federal Circuit suggested

that the *Lucas* per se test applies even when there is less than a total taking. In *Florida Rock*, there was a 95 percent diminution of value. The *Florida Rock* Court stated further that in a takings case, the court must resolve two preliminary questions: "whether a regulation must destroy a certain proportion of a property's economic use or value in order for a compensable taking . . . to occur," and "how to determine, in any given case, what that proportion is." *Id.* at 1568; *see also Palm Beach Isles Associates v. United States*, 208 F.3d 1374, 1379 (Fed. Cir. 2000), *petition for rehearing or rehearing en banc filed* (May 26, 2000) ("[W]hen . . . the regulatory imposition has deprived the owner of all economically viable use of his property (a 'categorical taking'), then the only remaining issue is the Government's defense under . . . state property law . . . [or] . . . the common law nuisance doctrine.").

In *Chioffi v. City of Winooski*, 676 A.2d 786 (Vt. 1996), the Vermont Supreme Court held that even though the property owner may not have had reasonable investment-backed expectations for use of his building after it had been destroyed by a fire, he could still be entitled to just compensation if he could show that all economically beneficial use of his land had been also destroyed: "[a]ny expectation of a three-unit residential development was no longer 'reasonable,' . . . only the total denial of all economically beneficial use would, under the circumstances, create a taking." *Id.* at 790 (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017 n.7 (1992)).

Likewise, in *Lopes v. City of Peabody*, 629 N.E.2d 1312 (Mass. 1994), the Massachusetts Supreme Court held that "[i]f the judge concludes that the zoning regulation deprives the parcel of all economically beneficial use, the

Lucas opinion advises us that there is a categorical regulatory taking. . . . " *Id.* at 1316. Finally, in *Ohio ex rel. Pizza v. Rezcallah*, 702 N.E.2d 81, 93 (Ohio 1998), the Ohio Supreme Court held that the mandatory locking of a storehouse that precluded the owners from making any use of the storehouse for that period of time was a per se violation of the Just Compensation Clause.

In sharp contrast, numerous courts, including the court below, have not followed the *Lucas* rule and have held that even when a regulation deprives a property owner of all use of his property, the property owner must satisfy the reasonable, investment-backed expectations prong of the *Penn Central* test. The leading case for the establishment of the anti-*Lucas* rule, and relied on by the court below, is *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999), *cert. denied*, 120 S. Ct. 1544 (2000). In *Good*, the U.S. Court of Appeals for the Federal Circuit held that the owner of 40 acres of undeveloped land in Florida was not entitled to just compensation for the taking of all beneficial and productive use of his property by virtue of his being denied a Section 404 permit. The Federal Circuit held that just compensation was not warranted in that case where because of "the growing consciousness of and sensitivity toward environmental issues," the landowner should have foreseen that "the regulatory climate" would bar any future use of his property, even though the landowner had acquired the land prior to enactment of the statute that barred his current proposed use. *Id.* at 1361, 1363;[9] *see also Outdoor Graphics, Inc. v. City of Burlington*,

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[9] Without taking any evidence on the issue and in direct contradiction to the affidavits filed by petitioners proving their

103 F.3d 690 (8th Cir. 1996) (rejecting takings claim on the ground that the property owner knew that the regulatory program in place precluded use of the property).

The *Good* rule has been followed by three courts of last resort at the State level and the Federal District Court for the District of Columbia. Not only has the Supreme Court of South Carolina followed the *Good* rule in this case, but it also followed it in *McQueen v. South Carolina Coastal Council*, 530 S.E.2d 628 (S.C. 2000), *petition for cert. filed* (Aug. 22, 2000). In *McQueen*, the landowner was denied two coastal permits which resulted in his being foreclosed from any beneficial and productive use of his land. *Id.* at 629-30. The South Carolina Supreme Court nevertheless held that he was not entitled to just compensation because his beachfront property had been the subject of at least some developmental regulation for over a century. *Id.* at 630-35. The court concluded that the landowner had thus demonstrated a "distinct lack of investment-backed expectations" to warrant just compensation. *Id.* at 635.

In *Palazzolo v. Rhode Island ex rel. Tavares*, 746 A.2d 707 (R.I. 2000), *petition for cert. filed* (June 21, 2000), the landowner sought just compensation for the taking of his land from the Rhode Island Coastal Resources Management

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legitimate expectations that video gaming would continue to be lawful and profitable in South Carolina, the court below made the finding that: "Where, as here, the regulatory climate renders an owner's investment-backed expectations unreasonable, no taking will be found." *Westside Quik Shop, Inc. v. Stewart*, No. 25158, 2000 WL 823346 at *4 (S.C. June 21, 2000) (citing *Good v. United States*, 189 F.3d 1355, 1362-63 (Fed. Cir. 1999) (App. at 10A).

Council (CRMC). The Rhode Island Supreme Court held that the landowner was not entitled to just compensation because: "At that time, there were already regulations in place limiting Palazzolo's ability to fill the wetlands for development. In light of these regulations, Palazzolo could not reasonably have expected that he could fill the property and develop a seventy-four-lot subdivision." *Id.* at 717. In *Colorado Dept. of Health v. The Mill*, 887 P.2d 993 (Colo. 1994), *cert. denied*, 515 U.S. 1159 (1995), the Colorado Supreme Court held that there was no unconstitutional taking of the owners' property because the owners lacked a reasonable expectation that they could use the property in the manner they intended.

Finally, in *District Intown Properties Limited Partnership v. District of Columbia*, 198 F.3d 874 (D.C. Cir. 1999), *petition for cert. filed* (April 17, 2000), the landowner sought just compensation for the taking of his land following denial of permits to construct townhouses in the District of Columbia. The United States District Court of the District of Columbia held that the landowner was not entitled to just compensation because "[the landowner] purchased and subdivided its property subject to an existing regulatory scheme that establishes that [the landowner] could have had no reasonable expectations of development at the time it made its investments." *Id.* at 883.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: September 19, 2000

WESTSIDE QUIK SHOP, INC., Phelix C. Byrd, Ree M. Byrd, and Winner's Pot of Gold Hot Spot, Inc., Plaintiffs,

v.

Robert M. STEWART, Sr., in his official capacity as Chief of the State Law Enforcement Division; and Charles M. Condon, in his official capacity as Attorney General for the State of South Carolina, Defendants.

No. 25158.

Supreme Court of South Carolina.

Submitted June 20, 2000.

Decided June 21, 2000.

George M. Hearn, Jr., of Hearn, Brittain & Martin, P.A., of Conway; John L. Napier, of Winston & Strawn, of Washington, D.C.; and Roger J. Marzulla and Nancie G. Marzulla, both of Marzulla & Marzulla, of Washington, D.C., for plaintiffs.

Attorney General Charles M. Condon, Assistant Deputy Attorney General Robert D. Cook, Assistant Deputy Attorney General J. Emory Smith, Jr., Senior Assistant Attorney General Nathan Kaminski, Jr., Assistant Attorney General Christie Newman Barrett, and Richard H. Seamon, of University of South Carolina School of Law, all of Columbia, for defendants.

IN THE ORIGINAL JURISDICTION

MOORE, J.

Plaintiffs are the owners and lessees of video gaming machines used for profit in their places of business. On May 25, 2000, plaintiffs filed this action in circuit court

challenging the constitutionality of 1999 S.C.Act No. 125 which, among other things, makes possession of these machines illegal as of July 1, 2000. Plaintiffs seek an injunction against enforcement of the Act claiming it effects an unconstitutional taking of their property without just compensation.

Because of the great public interest in finally determining this matter, we accepted the case in our original jurisdiction and ordered expedited briefing. Having considered the extensive briefs of the parties, we hold compensation is not constitutionally required under either our Federal or State Constitutions. Accordingly, we deny the injunction.

BACKGROUND

For nearly seventy years, gaming machines have been illegal in this State and subject to forfeiture as contraband. In 1931, the General Assembly enacted a comprehensive statute outlawing the possession of all forms of gambling devices, including vending machines that could be operated as gambling devices. 1931 S.C.Act No. 368.[1] In 1982, however, the General Assembly enacted an exemption for "video games with free play feature" which were a relatively recent technological development. 1982 S.C.Act No. 466.[2] In *State v. Blackmon*,

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[1] Codified as 1932 Code of Laws § 1301-A.

[2] Codified as S.C.Code Ann. § 52-15-10 and subsequently recodified as § 12-21-2710. In 1997, this section was amended to limit the exemption for video games to those "which meet the technical requirements provided for in Section 12-21-2782 and Section 12-21-2783." 1997 S.C.Act No. 155, Pt. II, § 54(B).

304 S.C. 270, 403 S.E.2d 660 (1991), we held nonmachine cash payouts from these video gaming machines were legal under a pre-existing statute, S.C.Code Ann. § 16-19-60 (Supp.1999).[3]

In the ensuing years, our State witnessed the dramatic growth of video gaming into a multi-billion dollar industry that became the subject of much public debate. Despite the repeated introduction of legislation aimed at repealing the exemption for video gaming machines,[4] no legislation was passed until 1993. In July of that year, the General Assembly provided for local option referenda to be held on a county by county basis to determine whether nonmachine cash payouts for video gaming should become illegal. 1993 S.C.Act No. 164, Pt. II, § 19H. In November 1994, twelve counties voted in favor of making such payouts illegal. The local option referenda, however, were ultimately struck down by this Court in 1996 as unconstitutional special legislation. *Martin v. Condon*, 324 S.C. 183, 478 S.E.2d 272 (1996). Cash payouts once again became legal throughout the State.

In November 1998, this Court upheld the statutory scheme regulating video gaming machines against a challenge that this type of gaming device constituted an

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[3] Repealed effective July 1, 2000, by 1999 S.C.Act No. 125, Pt. I, § 8.

[4] *See, e.g.*, H.R.3823, 108th Leg., 2d Sess. (1989) (bill to repeal § 16-19-60); H.R.3867, 108th Leg., 2d Sess. (1989) (bill to make it unlawful to have or to operate a machine for playing games which utilize a deck of cards); H.R.3104, 109th Leg., 1st Sess. (1991) (bill to repeal § 16-19-60).

unconstitutional lottery. *Johnson v. Collins Entertainment Co.*, 333 S.C. 96, 508 S.E.2d 575 (1998).

Finally, in an extra session called by the Governor in June 1999, the General Assembly enacted 1999 S.C.Act No. 125 providing for a November referendum to be held statewide to decide the fate of video gaming. Voters would be asked whether cash payouts for video gaming machines should continue to be allowed after June 30, 2000. If voters answered "no," Part I of the Act would become effective July 1, 2000. This part of the Act repeals § 16-19-60, which allows nonmachine cash payouts, and amends S.C.Code Ann. § 12-21-2710 (2000) to remove the exemption for video gaming machines, thereby rendering the possession or operation of these machines illegal.[5] Further, under S.C.Code Ann. § 12-21-2712 (2000), these machines are then subject to forfeiture and destruction by the State.[6]

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[5] Section 12-21-2710, as amended effective July 1, 2000, provides in part:

> It is unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State any vending or slot machine, or any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value. . . .

[6] Section 12-21-2712, as amended effective July 1, 2000, provides:

> Any machine, board, or other device prohibited by Section 12-21-2710 must be seized by any law enforcement officer and at once taken before any magistrate of the county in which the machine, board, or device is seized who shall immediately examine it, and if satisfied that it is in violation of Section

Before the referendum was held, an action was brought challenging its constitutionality. After taking the case in our original jurisdiction, in October 1999, this Court struck down the referendum but severed it from the remaining parts of the Act. Specifically, we found Part I, which bans the possession or operation of these machines, to be a free standing legislative enactment and therefore valid. *Joytime Distrib. and Amusement Co. v. State*, Op. No. 25007 (S.C.Sup.Ct. filed October 14, 1999) (Shearouse Adv.Sh. No. 32 at 10). Accordingly, on July 1, under §§ 12-21-2710 and -2712, these machines will become contraband subject to forfeiture and destruction regardless of their use or operability. *See State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000).

More than seven months after our decision in *Joytime* and less than six weeks before the impending ban will go into effect, plaintiffs commenced this action.

ISSUES

I. Are plaintiffs entitled to compensation for the forfeiture of their video gaming machines?

II. Are plaintiffs entitled to compensation for their loss of business?

III. Are plaintiffs entitled to compensation for the real property upon which their businesses are located?

12-21-2710 or any other law of this State, direct that it be immediately destroyed.

DISCUSSION

I.

Plaintiffs contend Act. No. 125 should be enjoined because it effects a taking of their video gaming machines without compensation. We find plaintiffs are entitled to no compensation because their machines are lawfully subject to forfeiture as contraband.

The forfeiture of contraband that comports with the Fourteenth Amendment's Due Process Clause[7] is not a compensable taking under the Takings Clause of the Fifth Amendment.[8] *Bennis v. Michigan*, 516 U.S. 442, 452 (1996); *see also United States v. $7,990.00 in U.S. Currency*, 170 F.3d 843 (8th Cir.1999). Nor is it a compensable taking under the corresponding provision of our State Constitution, article I, § 13. *Myers v. Real Property at 1518 Holmes Street*, 306 S.C. 232, 411 S.E.2d 209 (1991).

Under § 12-21-2712, gaming machines that are operated or possessed in violation of § 12-21-2710 are subject to forfeiture as contraband per se. *192 Coin-Operated Video Game Machines, supra*. Act No. 125 amends § 12-21-2710 to include the video gaming machines in question which will become subject to forfeiture under § 12-21-2712 as of July 1, 2000. We have already determined that the forfeiture of gaming machines pursuant to these statutes

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[7] "[N]or shall any state deprive any person of life, liberty, or property, without due process of law." U.S. Const., Amend. XIV, § 1.

[8] "[N]or shall private property be taken for public use, without just compensation." U.S. Const., Amend. V.

accords with due process requirements. *Id.*[9] We see no reason to answer this question differently where the forfeiture applies to video gaming machines that until recently were not contraband.

In determining whether the forfeiture of a particular type of property violates due process, we consider the nature of the property, the necessity for its sacrifice, and the extent to which it has heretofore been regarded as within the police power. *See Sentell v. New Orleans & C.R. Co.*, 166 U.S. 698, 705 (1897); *Peoples Program for Endangered Species v. Sexton*, 323 S.C. 526, 529, 476 S.E.2d 477, 479 (1996). Gamingdevices in general have long been recognized as legitimately within the police power of the State to control or take by forfeiture, *Lawton v. Steele*, 152 U.S. 133, 136 (1894), and we have consistently deferred to the legislature's determination of what gaming devices must be sacrificed for the public welfare. *See, e.g., Johnson v. Collins Entertainment Co., supra.* Further, we have acknowledged the difficulty of enforcing statutes prohibiting gaming. *State v. Kizer*, 164 S.C. 383, 162 S.E. 444 (1932), overruled on other grounds, *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000). As the United States Supreme Court has observed, forfeiture serves a deterrent purpose both by preventing the further illicit use of the property and by imposing an economic penalty, thereby rendering the illegal behavior unprofitable. *Bennis*, 516 U.S. at 452 (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 687 (1974)). We

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[9] We construed § 12-21-2712 to include an opportunity for the owner to contest the magistrate's determination of illegality. *Id.* at 16.

conclude the forfeiture of gaming machines pursuant to §§ 12-21-2710 and -2712 comports with due process even when applied to machines that were previously lawfully possessed.

Further, we note there will have been a lapse of more than eight months from the time Part I of Act No. 125 became law by decision of this Court in October 1999 and the date it becomes enforceable on July 1, 2000. During this time, plaintiffs owning video gaming machines have been free to profitably dispose of them out of state. These plaintiffs have had a reasonable period of time to avoid any forfeiture of their property and cannot claim a compensable taking. *See Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146 (1919) (finding no taking under War-Time Prohibition Act which prohibited sale of liquor but allowed a period of seven months and nine days to dispose of stored liquor).

We find the forfeiture of plaintiffs' video gaming machines, or their leasehold interest in these machines, is not a compensable taking under either our Federal or State Constitutions.

II.

Plaintiffs claim the forfeiture of their video gaming machines effects a taking of their businesses.

It has long been settled that injury to a business dependent on confiscated property is not compensable under the Fifth Amendment. *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *Mitchell v. United States*, 267 U.S. 341 (1925); *Joslin Mfg. Co. v. City of Providence*, 262 U.S.

668 (1923); *cf. Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949) (where government has taken business for continued operation by government entity, Fifth Amendment requires compensation for going-concern value); *see also United States v. 57.09 Acres of Land*, 757 F.2d 1025 (9th Cir.1985); *Hooten v. United States*, 405 F.2d 1167 (5th Cir.1969); *United States v. Becktold Co.*, 129 F.2d 473 (8th Cir.1942); *cf. Yachts America, Inc. v. United States*, 779 F.2d 656 (Fed.Cir.1985) (destruction of business not compensable as separate element although value of business may be indirectly considered in valuation of land). The Fifth Amendment Takings Clause concerns itself solely with the owner's relation to the physical thing and not with consequential damages. *United States v. General Motors Corp.*, 323 U.S. 373 (1945). Collateral damages, which include lost business profits and goodwill, are not recoverable on a federal takings claim. *Id.*; *Mibbs v. South Carolina Dep't of Revenue*, 337 S.C. 601, 524 S.E.2d 626 (1999); *Carolina Power & Light Co. v. Copeland*, 258 S.C. 206, 188 S.E.2d 188 (1972).

We apply this same analysis to the takings claim under our State Constitution and find no taking of plaintiffs' businesses under either constitution.

III.

Plaintiffs claim the forfeiture of their video gaming machines effects a taking of the real property upon which their businesses are located.

To the extent § 12-21-2710 may be considered a land use regulation, we consider its economic impact, its interference with reasonable investment- backed expectations,

and the character of the governmental action in determining whether there has been a regulatory taking. *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). Although plaintiffs assert their real property is well-suited in location and configuration only to the video gaming business, they cannot tenably claim it will have absolutely no economic value if no longer used to house video gaming operations. Further, if the regulation does not deny the owner all economically viable use of his land, it does not constitute a taking if it substantially advances legitimate government interests. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). As discussed above, we find the forfeiture of video gaming machines does substantially advance legitimate government interests in prohibiting illicit gaming.

Moreover, even where he is deprived of all economically viable use of his property, an owner must still have reasonable investment-backed expectations to establish a taking. *Good v. United States*, 189 F.3d 1355 (Fed.Cir.1999); *McQueen v. South Carolina Coastal Council*, Op. No. 25108 (S.C.Sup.Ct. filed April 17, 2000) (Shearouse Adv.Sh. No. 15 at 1). A property owner operating in a highly regulated field cannot assert a reasonable expectation that government regulation will not be altered to his detriment. *Concrete Pipe and Products of California, Inc. v. Constr. Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986). Where, as here, the regulatory climate renders an owner's investment-backed expectations unreasonable, no taking will be found. *Good*, 189 F.3d at 1362-63 (finding that in light of growing public consciousness and sensitivity on issue, owner must have been aware that the

standards and conditions governing the issuance of permits could change to his detriment).

We apply this same analysis to the takings claim under our State Constitution and conclude plaintiffs have established no taking of their real property under either constitution.

CONCLUSION

Because we find plaintiffs' takings claims to be without merit, we refuse to enjoin the enforcement of Part I of Act No. 125. Further, we summarily dispose of plaintiffs' 42 U.S.C. § 1983 cause of action. *See Brown v. Evatt*, 322 S.C. 189, 470 S.E.2d 848 (1996) (§ 1983 cause of action fails where no constitutional deprivation).

INJUNCTION DENIED.

TOAL, C.J., BURNETT, PLEICONES, JJ., and Acting Justice JAMES W. JOHNSON, JR., concur.

THE SUPREME COURT OF
SOUTH CAROLINA

Westside Quik Shop, Inc., Phelix C. Byrd, Ree M. Byrd, and Winner's Pot of Gold Hot Spot, Inc. — Respondents

v.

Robert M. Stewart, in his official capacity as Chief of the State Law Enforcement Division; Charles M. Condon, in his official capacity as Attorney General for the State of South Carolina, — Petitioners

ORDER

Petitioners ask to remove this matter from the circuit court for this Court to hear it in our original jurisdiction and for an expedited briefing schedule. Respondents oppose the petition.

The requests are granted. Pursuant to Rule 229, SCACR, the parties shall serve and file briefs addressing the questions of law involved in this matter and copies of the items they seek to have included in the record by June 12, 2000. Thereafter, the parties may file any objections to the items the other parties seek to include in the record and may serve and file reply briefs by June 16, 2000. All materials shall be served on the opposing parties and filed with the Clerk of the Court no later than 5:00 p.m. on the due date.

IT IS SO ORDERED.

Columbia, South Carolina, June 6, 2000.

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS

THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE

C.A. NO.: 2000-CP-23-

WESTSIDE QUIK SHOP, INC., PHELIX C. BYRD, REE M. BYRD, AND WINNER'S POT OF GOLD HOT SPOT, INC.

Plaintiffs,

v.

ROBERT M. STEWART, SR., in his official capacity as Chief of the State Law Enforcement Division; CHARLES M. CONDON, in his official capacity as Attorney General for the State of South Carolina,

Defendants.

AFFIDAVIT OF PHELIX C. BYRD

I, Phelix C. Byrd, pursuant to South Carolina Rule of Civil Procedure 11(c), hereby testify:

1. I am 53 years old and reside at 914 Sweet Bay Drive, Hartsville, South Carolina, 29550, Darlington County, with my wife, Ree M. Byrd. I am a registered voter in Darlington County.

2. I have two sons, Carrigan Byrd, Jr. and Braudy Jonathan Byrd. Jonathan was recently married and lives

in our home with his wife, Janie Moore Byrd. Jonathan works with my wife and me in our video poker business and his and Janie's sole income is derived from our video poker business.

3. In the mid-1960s, I joined the South Carolina National Guard and took the only position then available, as a cook. I served in that position for 14 years until I entered the Officers' Candidate School in 1976. In 1978, I received my commission from the OCS and served in the Guard as an officer for 21 years. In 1989, I retired from the Guard as a Major.

4. I have an associate degree in Industrial Engineering, which I received in 1970 from Florence-Darlington Technical College. Before entering into the gaming business in the 1970's, I held positions in several businesses, including a paper manufacturing plant and an electronics firm. Since the late-1970s, I have also run bingo operations for various charitable organizations, including the Cheraw Academy in Chesterfield County, and the Church of Lord Jesus Christ, and the Union Baptist Church, both of which are located in Darlington, South Carolina.

5. In 1992, after my bingo operations became unprofitable, my wife and I entered into the video poker industry by leasing 15 draw poker machines from Tim's Amusement (formerly Harrison King Music Company). According to a written lease agreement, we split the income received from the video poker machines on a 50%-50% basis; Tim's Amusement received 50% of the income from the machines and we received the other 50%.

6. On July 6, 1998, for business purposes, my wife and I elected to incorporate our video poker business as a "Subchapter S" Corporation. The business is incorporated as Winner's Pot of Gold Hot Spot, Inc. with corporate headquarters located at 914 Sweet Bay Drive, Hartsville, South Carolina, 29550. My wife and I are equal shareholders; I am the President of the corporation and my wife is the Vice President.

7. Although at one time, we had as many as 125 employees, Winner's Pot of Gold Hot Spot, Inc. now employs approximately 80 employees, including room attendants, cashiers, managers, and the like. The corporation pays out around $20,000 per week in salaries and wages to these 80 employees.

8. Winner's Pot of Gold Hot Spot, Inc. now leases a total of 195 video poker machines from Tim's Amusement and Resort Properties South and operates them at four different physical locations. The corporation currently splits the profit received from the machines with Tim's Amusement and Resort Properties South on a 60%-40% basis.

9. For the first half of 1998, my wife and I received $1,171,620 in gross receipts and a net income of $543,616 from video poker sales at our four physical locations. After we elected to incorporate the business in July of 1998, for the second half of 1998 (July 6, 1998 to December 31, 1998), the corporation received $786,644 in gross receipts or sales, which after deductions for payroll, license fees, depreciation, and other expenses, resulted in a net income of $379,067. I received half of that amount,

$189,533, as my net shareholder's share of income from the corporation.

10. Winner's Pot of Gold Hot Spot, Inc. operates 75 video poker machines at Highway 9 East, Wallace, South Carolina, 29250. We began renting the land at this location in 1979 for payments, which toward the end of the lease, equaled as much as $1200 per month. During this time, we invested approximately $400,000 in constructing a building for bingo and video poker. In June of 1998, a fire completely destroyed that building and all improvements located on this property.

11. After the fire destroyed our building in Wallace, we decided to purchase the land for approximately $150,000 and rebuild the building. As such, I began plans in June of 1998 to construct another building designed for one purpose specifically, to accommodate video poker, in strict compliance with all of the rules and regulations for video gaming required by the State of South Carolina. The State rules and regulations make the building unusable for any other purpose because they require that certain divider walls, wiring and other specifics be incorporated into the actual building design. We devoted most of all of the profits received from our video poker business during 1999 to reconstructing the building and restoring video poker at this location. The total cost of construction for this building was approximately $750,000. Although it was difficult, we managed to retain and pay all 80 employees of the corporation during this time.

12. Winner's Pot of Gold Hot Spot, Inc. also operates 45 machines at 707 South Parker Street, Florence,

South Carolina, 29501. I acquired this property in 1996 for approximately $130,000 and subsequently built all the improvements on the land. Similar to the Wallace location, I planned to construct a single-purpose building, designed specifically to accommodate video gaming in strict compliance with all of South Carolina's rules and regulations for video gaming. Again, because this building was specifically designed to comply with the laws regarding multi-room video gaming, it is unusable for any other purpose. We began construction of the building in 1997, but due to the reconstruction of the building located in Wallace, South Carolina, we were unable to complete construction of this building until May of 1999. The total cost for the construction of this building was approximately $600,000. By reason of administrative delays caused by the South Carolina Tax Commission, we were prevented from opening our doors to video poker customers at the Florence location until late February of 2000.

13. Winner's Pot of Gold Hot Spot, Inc. also has video poker operations at two leased properties. The corporation operates 55 machines at Highway 9 West, Pageland, South Carolina, 29520. We have leased the building located on this property from Mary Campbell and Rennie Morris for a term of 10 years. Currently, one year remains on this lease. Between 1997 and 1998, we spent approximately $160,000 in renovations to the building located here, specifically to accommodate the video poker business. Winner's Pot of Gold Hot Spot, Inc. also operates 20 machines at 792 South Main Street, Society Hill, South Carolina, 29563. We have leased the building at this location from Jacob's Estate for a term of five years

and three years remain on this lease. We similarly invested approximately $60,000 in renovations to the building at this location, to accommodate our video poker business.

14. My wife and I would never have undertaken such enormous debt and expense in acquiring property, constructing two new buildings which were specifically designed for video poker, and renovating our other leased spaces for video poker if we had ever thought that video poker would be completely banned in the state of South Carolina. In fact, I was assured that, because we had adhered so strictly to the intricate laws and regulations regarding video gaming, we would have no problems in continuing our growing and successful businesses, bringing in enough sales to pay for the debt we incurred.

15. I have read over the May 8, 2000 statement of the Attorney General, stating that, as a result of Act 125, all video poker machines must be out of the state before midnight June 30, 2000, and that those of us involved who operate and possess video poker machines are subject to arrest, fines and imprisonment for merely continuing in our normal business operations. If Act 125 were to go into effect on July 1, 2000, outlawing the operation and possession of all video poker machines, we would be forced to remove all video poker machines from both the video poker locations in Wallace, South Carolina and Florence, South Carolina. Because video poker provides the only basis for generating income at both these sites, we would be forced to close down the businesses at both these locations. We would also be forced to sell both of

these properties in order to pay the outstanding mortgages and notes we currently owe to Carolina Bank and Trust. The buildings on both properties hold little value, as they were designed for only one purpose, video gaming, and would have to be completely gutted and renovated to harbor any other commercial enterprise. As for the Wallace property, while good for video poker, its location is isolated from regular traffic patterns and would draw few customers for other retail businesses. Hence, the entire property would be rendered practically worthless if video poker could not be operated there. The Florence property, just finished and opened after the delay, is nearly as unusable. It could not be converted to another use for less than $300,000, which would far exceed its fair market value after renovation. In consequence, Florence also has only nominal value without video poker.

16. Our total indebtedness at this point is $1.3 million. By rendering these two real properties valueless, Act 125 insures that they will be foreclosed and that we will have no income to pay off this debt, which encumbers our personal home and everything else we own. With no income and huge debt payments, bankruptcy and financial ruin will be the corporation's only option.

17. Furthermore, if Act 125 were to go into effect on July 1, 2000, we would be forced to remove all video poker machines the corporation currently operates at the Pageland, South Carolina and Society Hill, South Carolina locations. However, we would still be obligated under the terms of the lease agreements for the buildings at both locations. We would remain obligated for one

year under the lease agreement for the building in Pageland and for three years for the building in Society Hill. The lease payments will continue, at a total of $1,600 per month. However, there would be no source of income from these properties, as these buildings are not suited to any commercially reasonable pursuit within my capabilities, and could not be sublet for anything like the rents we are paying.

18. Although we have always done everything in our power to keep our loyal employees in jobs, even during the tough months of reconstruction at the Wallace location, outlawing the operation and possession of all video poker machines, would mean that all 80 employees of the corporation would lose their jobs and means of income. Not only would they suffer a loss, but so would their families who depend on that income.

19. Finally, the enforcement of Act 125 would destroy mine and my wife's sole source of income and we would be forced to file bankruptcy. We would be forced to sell personal properties, including our own home, to pay mortgages and other loans that we currently owe. Not only that, but my son and his wife, who currently live in our home, would lose their only means of income and effectively put us all out of a place to live. I respectfully request the intervention of this Court to help protect our business, our home and our family's livelihood and well-being.

_____

Phelix C. Byrd

Sworn to before me this ___
day of May, 2000.

_____

Notary Public for S.C.
My commission expires: ___

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS

THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE C.A. NO.: 2000-CP-

WESTSIDE QUIK SHOP, INC., PHELIX C. BYRD, REE M. BYRD, AND WINNER'S POT OF GOLD HOT SPOT, INC. Plaintiffs, v. ROBERT M. STEWART, SR., in his official capacity as Chief of the State Law Enforcement Division; CHARLES M. CONDON, in his official capacity as Attorney General for the State of South Carolina, Defendants.	**AFFIDAVIT OF REE M. BYRD**

I, Ree M. Byrd, pursuant to South Carolina Rule of Civil Procedure 11(c), hereby testify that:

1. I am 47 years old and reside at 914 Sweet Bay Drive, Hartsville, South Carolina, 29550, Darlington County, with my husband, Phelix C. Byrd. I am a registered voter in Darlington County.

2. I have two sons, Carrigan Byrd, Jr. and Braudy Jonathan Byrd. Jonathan was recently married and lives in our home with his wife, Janie Moore Byrd. Jonathan

works with my husband and me in our video poker business and his and his wife's sole income is derived from our video poker business.

3. In 1992, after our bingo operations became unprofitable, my husband and I entered into the video poker industry by leasing 15 draw poker machines from Tim's Amusement (formerly Harrison King Music Company). According to a written lease agreement, we split the income received from the video poker machines on a 50%-50% basis; Tim's Amusement received 50% of the income from the machines and we received the other 50%.

4. On July 6, 1998, for business purposes, my husband and I elected to incorporate our video poker business as a "Subchapter S" Corporation. The business is incorporated as Winner's Pot of Gold Hot Spot, Inc. with corporate headquarters located at 914 Sweet Bay Drive, Hartsville, South Carolina, 29550. My husband and I are equal shareholders; I am the Vice President of the corporation and my husband is the President.

5. Winner's Pot of Gold Hot Spot, Inc. employs approximately 80 employees, including room attendants, cashiers, managers, and the like. The corporation pays out around $20,000 per week in salaries and wages to these 80 employees.

6. Winner's Pot of Gold Hot Spot, Inc. now leases a total of 195 video poker machines from Tim's Amusement and Resort Properties South and operates them at four different physical locations. The corporation currently splits the profit received from the machines with Tim's Amusement on a 60%-40% basis.

7. For the first half of 1998, my husband and I received $1,171,620 in gross receipts and a net income of $543,616 from video poker sales at our four physical locations. After we elected to incorporate the business in July of 1998, for the second half of 1998 (July 6, 1998 to December 31, 1998), the corporation received $786,644 in gross receipts or sales, which after deductions for payroll, license fees, depreciation, and other expenses, resulted in a net income of $379,067. I received half of that amount, $189,533, as my net shareholder's share of income from the corporation.

8. Winner's Pot of Gold Hot Spot, Inc. operates 75 video poker machines at Highway 9 East, Wallace, South Carolina, 29250. We began renting the land at this location in 1979 for payments, which toward the end of the lease, equaled as much as $1200 per month. During this time, we invested approximately $400,000 in constructing a building for bingo and video poker. In June of 1998, a fire completely destroyed the building and all improvements located on this property.

9. After the fire destroyed our building in Wallace, we decided to purchase the land, for approximately $150,000 and rebuild the building. My husband and I began plans in June of 1998 to construct another building designed for one purpose specifically to accommodate video gaming and in strict compliance with all of the rules and regulations for video gaming required by the State of South Carolina. These State rules and regulations make the building unusable for any other purpose because they require that certain divider walls, wiring and other specifics be incorporated into the actual building design. We devoted most all of the profits received

from our video poker business during 1999 to reconstructing the building and restoring video poker at this location. The total cost of construction for this building was approximately $750,000. Although it was difficult, we managed to retain and pay all 80 employees of the corporation during this time.

10. Winner's Pot of Gold Hot Spot, Inc. operates 45 machines at 707 South Parker Street, Florence, South Carolina, 29501. My husband acquired this property in 1996 for approximately $130,000 and subsequently built all the improvements on the land. Similar to the Wallace location, we planned to construct a single-purpose building, designed specifically to accommodate video gaming in strict compliance with all of South Carolina's rules and regulations for video gaming. Again, because this building was specifically designed to comply with the laws regarding multi-room video gaming, it is unusable for any other purpose. We began construction of the building in 1997, but due to the reconstruction of the building located in Wallace, South Carolina, we were unable to complete construction of this building until May of 1999. The total cost for the construction of this building was approximately $600,000. By reason of administrative delays caused by the South Carolina Tax Commission, we were prevented from opening our doors to video poker customers at the Florence location until late February of 2000.

11. Winner's Pot of Gold Hot Spot, Inc. also operates 55 machines at Highway 9 West, Pageland, South Carolina, 29520. The corporation currently leases the building located on this property from Mary Campbell and Rennie Morris for a term of 10 years. Currently, one

year remains on this lease. Between 1997 and 1998, we spent approximately $160,000 in renovations to the building located there, specifically to accommodate our video poker business.

12. Winner's Pot of Gold Hot Spot, Inc. operates 20 machines at 792 South Main Street, Society Hill, South Carolina, 29563. The corporation currently leases the building located on this property from Jacob's Estate for a term of five years. Currently, three years remain on this lease. We also invested approximately $60,000 in renovations to the building at this location, to accommodate our video poker business.

13. My husband and I would never have undertaken such enormous debt and expense in acquiring property, constructing two new buildings, specifically designed for video poker, and renovating our other leased spaces for video poker if we had ever thought that video poker would be completely banned in the State of South Carolina. In fact, we were assured that, because we had adhered so strictly to the intricate laws and regulations regarding video gaming, we would have no problems in continuing our growing and successful businesses, bringing in enough sales to pay for the debt we have incurred.

14. If Act 125 were to go into effect on July 1, 2000, outlawing the operation and possession of all video poker machines, Winner's Pot of Gold Hot Spot, Inc. would be forced to file bankruptcy. We would be forced to remove all video poker machines the corporation currently operates from both the video poker locations in Wallace, South Carolina and Florence, South Carolina.

Because video poker provides the only basis for generating income at both these sites, we would be forced to close down the businesses at both these locations. We would also be forced to sell both of these properties in order to pay the outstanding mortgages and notes we currently owe to Carolina Bank and Trust. The buildings on both properties hold little value, as they were designed for only one purpose, video gaming, and would have to be completely gutted and renovated to harbor any other commercial enterprise. As for the Wallace property, while good for video poker, its location is isolated from regular traffic patterns and without any incentive, would draw few customers for other retail businesses. Hence, the entire property would be rendered practically worthless if video poker could not be operated there. The Florence property, just finished and opened after the delay, is nearly as unusable. It could not be converted to another use for less than $300,000, which would far exceed its fair market value after renovation. In consequence, Florence also has only nominal value without video poker.

15. Our total indebtedness at this point is $1.3 million. By rendering these two real properties valueless, Act 125 insures that they will be foreclosed and that we will have no income to pay off this debt, which encumbers our personal home and everything else we own. With no income and huge debt payments, bankruptcy and financial ruin will be the corporation's only option.

16. Furthermore, if Act 125 were to go into effect on July 1, 2000, we would be forced to remove all video poker machines the corporation currently operates at the

Pageland, South Carolina and Society Hill, South Carolina locations. However, we would still be obligated under the terms of the lease agreements for the buildings at both locations. We would remain obligated for one year under the lease agreement for the building in Pageland and for three years for the building at Society Hill. The lease payments will continue, at a total of $1,600 per month. However, there would be no source of income from these properties, as these buildings are not suited to any commercially reasonable pursuit within my capabilities, and could not be sublet for anything like the rents we are paying.

17. Outlawing the operation and possession of all video poker machines would mean all 80 loyal employees of Winner's Pot of Gold Hot Spot, Inc. would lose their jobs and means of income. Not only would they suffer a loss, but also would their families whom depend on that income.

18. My husband and I will lose our sole source of income and be forced to file bankruptcy. We will be forced to sell personal properties, including our own home, to pay mortgages and other loans that we currently owe. My son and his wife will also lose their sole source of income and place of residence.

_____

Ree M. Byrd

Sworn to before me this ___
day of May, 2000.

_____

Notary Public for S.C.

My commission expires: ___

_____

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS

THIRTEENTH JUDICIAL COURT
COUNTY OF GREENVILLE C.A. NO.:2000-CP-

PHELIX C. BYRD, REE M. BYRD, WINNER'S POT OF GOLD HOT SPOT, INC., AND WESTSIDE QUIK SHOP, INC.,

Plaintiffs,

ROBERT M. STEWART, SR., in his official capacity as Chief of the State Law Enforcement Division; CHARLES M. CONDON, in his official capacity as Attorney General for the State of South Carolina,

Defendants.

AFFIDAVIT OF A. CRAWFORD CLARKSON

I, A. Crawford Clarkson, Jr., pursuant to South Carolina Rule of Civil Procedure 11(c), testify as follows:

1. I currently reside and work as a Certified Public Accountant (CPA) and Attorney in Columbia, South Carolina, specializing in matters of state and federal taxation and business law.

2. I earned a BS degree in Commerce from the University of South Carolina in 1941. Subsequently, I

attended the University of South Carolina School of Law and was awarded a LLB/JD in 1955.

3. I have been a Certified Public Accountant, certified under the laws of the state of South Carolina since 1948.

4. I was admitted in 1948 as partner within the accounting firm of A.C. Clarkson and Company which became Clarkson, Harden and Gantt, CPAs, which subsequently combined with Arthur Young, later becoming Ernst & Young.

5. I was appointed by Governor Timmerman to the Joint Legislative Corporate Tax Study Committee and served as a member of the Committee from 1957 to 1958. I also served as a member and executive secretary of the South Carolina Tax Study Commission in 1958 to 1966.

6. I was appointed the Commissioner of the South Carolina Tax Commission by Governor Campbell in 1987 and appointed Chairman in 1992, in which position I served until 1995.

7. I have reviewed the 1998 corporate tax returns and financial records of the plaintiff, Winner's Pot of Gold Hot Spot, Inc. (Corporation), as well as the 1995 through 1998 individual income tax returns and other financial records of plaintiffs Phelix C. Byrd and Ree M. Byrd, for the purpose of determining the financial impact on these plaintiffs if video gaming is permitted to become illegal in South Carolina on July 1, 2000. The documents and records I have reviewed provide me with confidence that these records reflect, in material aspects, the taxable income of the entities for the years listed above. My review of these records leads me to the following opinion.

8. It is estimated that 90 percent of the gross income of the Corporation is derived from video poker operations. Phelix C. Byrd and Ree M. Byrd have invested large sums in the business now operated by the Corporation, and they have taken on significant personal debt to finance that business which is their source of income. The State's proposed complete prohibition of video poker will eliminate the Byrds' presently profitable business and the investment in time and money they have made to date.

_____

A. Crawford Clarkson, Jr.

Dated: May 23, 2000

_____

Notary Public

My commission expires: ___

Dated: May 23, 2000

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS

THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE C.A. NO.: 2000-13-___

WESTSIDE QUIK SHOP, INC., AND PHELIX C. BYRD, REE M. BYRD, WINNER'S POT OF GOLD HOT SPOT, INC. Plaintiffs, v. ROBERT M. STEWART, SR., in his official capacity as Chief of the State Law Enforcement Division; CHARLES M. CONDON, in his official capacity as Attorney General for the State of South Carolina, Defendants.	**AFFIDAVIT OF GARY CLARDY**

I, Gary Clardy, pursuant to South Carolina Rule of Civil Procedure 11(c), testify as follows:

1. I currently reside and work as a Bookkeeper and Tax Preparer in Greenville, South Carolina where I specialize in matters involving accounting, and state and federal taxation of small businesses.

2. I have been a Tax Preparer and Bookkeeper since 1973. I earned an Associate Degree in Accounting at Greenville Technical College in 1973

3. I have prepared all tax returns for Westside Quik Shop, Inc. since 1979.

4. My familiarity with the corporate tax returns and financial records of plaintiff, Westside Quik Shop, Inc. as well as the 1995 through 1998 individual income tax returns and other financial records of its sole shareholders, Ronald J. White and James M. ("Mike") Wright, leads me to the following opinion as to the financial impact on this plaintiff if video gaming becomes illegal in South Carolina on July 1, 2000.

5. I conclude that, if video poker becomes illegal on July 1, 2000, it will completely destroy all the economic value of Westside Quik Shop, Inc. The basis of this opinion follows.

6. Westside Quik Shop, Inc. is a subchapter S Corporation, organized under South Carolina law. Its sole shareholders are Ronald J. White and James M. ("Mike") Wright. The principal physical assets of the corporation consist of two single-purpose buildings located in Greenville and Pelzer, South Carolina. These business locations are most unlikely to generate sufficient income to pay the existing mortgage payments without the profits generated by the installed video poker machines. Consequently, without video poker machines, the properties become liabilities, costing more in upkeep than they can generate in income.

7. Since the sole profit of the business is derived from video poker operations, the immediate cessation of this business on July 1, 2000 will result in the corporation's expenses far exceeding its income. (Although the corporation has a minor convenience store business, that

operation loses money each year.) Put succinctly, deprived of its sole profitable line of business and saddled with substantial expenses, the corporation's stock becomes absolutely worthless on July 1, 2000 if video poker operations become unlawful in South Carolina.

8. Mr. Ronald White and Mr. Michael Wright have invested everything in the business now operated by the corporation, and have taken on significant personal debt to finance that business. Should their sole source of income, the video poker business operated by Westside Quik Shop, Inc., abruptly cease on July 1, they will almost immediately find themselves unable to service their debt load or to pay personal and family expenses such as food, clothing and shelter. Given their debt load, and the fact that the corporation's real estate assets have little or no value without video poker, there is little doubt that they would be required to file personal bankruptcy, and that their creditors would receive only pennies on the dollar.

9. In my long career as a Bookkeeper, I have had the opportunity to become familiar with many types of small businesses, including video poker. As a business, video poker is not substantially different from many other kinds of entertainment. It requires a certain investment in tangible property, the building up of a customer base, and continual upgrading to maintain competitiveness. Mr. Ronald White and Mr. Michael Wright, and the corporation have operated and invested in their business in a prudent fashion. Their investment in the buildings and fixtures was, in large part, dictated by state regulations. As with any other entertainment business, the State's complete prohibition of video poker will completely destroy the present profitable business of the Westside

Quik Shop, Inc., eliminating all value from the substantial investment in time and money it has generated to date.

Further the deponent sayeth naught.

_____

Gary Clardy

SWORN TO BEFORE ME
This ___ day of May, 2000.

Notary Public for South Carolina
My Commission Expires: ___

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS

THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE C.A. NO.: 2000-CP-23-

WESTSIDE QUIK SHOP, INC., AND PHELIX C. BYRD, REE M. BYRD, WINNER'S POT OF GOLD HOT SPOT, INC. Plaintiffs, v. ROBERT M. STEWART, SR., in his official capacity as Chief of the State Law Enforcement Division; CHARLES M. CONDON, in his official capacity as Attorney General for the State of South Carolina, Defendants.	**AFFIDAVIT OF FRED SEALE**

I, Fred Seale, pursuant to South Carolina Rule of Civil Procedure 11(c), hereby testify that:

1. I currently reside and work in Florence, South Carolina as a Certified Public Accountant, specializing in business financial planning and tax planning for individuals and businesses.

2. I am a 1975 graduate of the University of South Carolina where I obtained a Bachelor of Science degree with a major in accounting.

3. I have over twenty years' experience in public accounting in Florence, South Carolina with the same firm, which is now Burch, Oxner, Seale Company, CPA's, PA. During that period, I have performed audits of small to medium-sized businesses, prepared corporate and individual income tax returns, and acted in a consulting capacity on business and tax matters to my clients. In November of 1981, I successfully completed the CPA exam and was licensed to practice in the state of South Carolina in March of 1982. In September of 1997, I was awarded a Certificate of Educational Achievement by the American Institute of Certified Public Accountants for the successful completion of their "Tax Planning & Advising for Closely Held Businesses" continuing education course.

4. I have been responsible for the preparation of the federal and state income tax returns of Phelix and Ree Byrd since 1997 and Winner's Pot of Gold Hot Spot, Inc. since its inception in July of 1998.

5. It is my opinion that, with the demise of video poker in South Carolina on July 1, 2000, Winner's Pot of Gold, Inc. will be unable to continue operating in its current venue and Phelix and Ree Byrd would be unable to meet their current obligations. The basis of my opinion is as follows:

a. Winner's Pot of Gold Hot Spot, Inc. is a subchapter S Corporation organized under the laws of the state of South Carolina on July 6, 1998. It operates video gaming establishments in the towns of Wallace, Pageland, Society Hill and Florence, South Carolina. Since its only revenue is generated from video poker machines, the effect of loss of revenue from

video poker on July 1, 2000 would be to cease the operations of the business. While the liabilities of Winner's Pot of Gold Hot Spot, Inc. are minimal, its assets are also minimal. The land, building and equipment used to operate these businesses are owned personally by the corporation's two shareholders, Phelix and Ree Byrd.

b. Phelix and Ree Byrd have personally purchased and constructed various buildings for the operation of video gaming. As of March 31, 2000, they were personally indebted for over 1.3 million dollars and had a monthly payment in excess of $20,000 on this indebtedness. If video poker becomes illegal on July 1, 2000, their only source of revenue to repay this indebtedness would be eliminated. The location of these establishments and the fact that the buildings are configured for video gaming would limit their marketability as commercial property should they have to dispose of the property to satisfy the debt.

Since the Byrds' income is derived almost exclusively from the operation of video gaming machines in Winner's Pot of Gold Hot Spot, Inc., it is my opinion that when video poker becomes illegal on July 1, 2000 they will be unable to meet their financial obligations and, in all probability, will be forced into personal bankruptcy.

Further the deponent sayetn naught.

_____

Fred Seale

SWORN TO BEFORE ME
This ___ day of May, 2000.

Notary Public for South Carolina
My Commission Expires: ___

_____

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS

THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE C.A. NO.: 2000-13-

WESTSIDE QUIK SHOP, INC., AND PHELIX C. BYRD, REE M. BYRD, WINNER'S POT OF GOLD HOT SPOT, INC. Plaintiffs, v. ROBERT M. STEWART, SR., in his official capacity as Chief of the State Law Enforcement Division; CHARLES M. CONDON, in his official capacity as Attorney General for the State of South Carolina, Defendants.	**AFFIDAVIT OF RONALD JAMES WHITE**

I, Ronald James White, pursuant to South Carolina Rule of Civil Procedure 11(c), hereby testify that:

1. I am the President of Westside Quik Shop, Inc., and have served in that capacity since the corporation was formed on October 1, 1979. I make this affidavit in support of the application of Westside Quik Shop, Inc. for a temporary injunction which, if denied, will result in destruction of the entire net profit of the corporation and bankruptcy for the corporation, its two shareholders, and their families.

2. I was born, and have lived all my life, in the Greenville, South Carolina area. I am now 53 years old and I currently reside at 675 Hester Store Rd., Easley, South Carolina, 29640, in Pickens County, with my wife. I am a registered voter in Pickens County. I have an associate degree in business, which I received from Greenville Technical College in 1969.

3. I am married to Cindy White, who does not work outside the home and has no independent source of income apart from our family business, the Westside Quik Shop.

4. For the past 22 years I have supported my family with the income derived from our family business the Westside Quik Shop. I got into this business in 1978 when James Michael Wright and I leased an old, abandoned Exxon service station located at 821 West Parker Road, Greenville, South Carolina, 29611, in Greenville County. With a loan of $15,000, we converted the service station into a convenience store that sells groceries, gas, and heating fuel. The Westside Quik Shop was one of the first convenience stores in the area. Since that time, the Westside Quik Shop has continued to serve the people in the area, many of whom have no transportation to other stores for food and fuel supplies.

5. In 1981, Westside Quik Shop, Inc. bought the real property at 821 West Parker Road, as well as the building and all improvements located there. At that time, we installed three video poker machines in the convenience store to supplement our very limited income derived from the sales of gas and groceries. The additional income provided by these video poker machines made it

possible for Mr. Wright and me to support our families. Without the income from those video poker machines, the Westside Quik Shop would have closed many years ago, because we cannot otherwise compete with large chain convenience stores. The income from the video poker machines makes it possible for us to pay the mortgage on the property and to maintain competitive prices on our groceries and gasoline, providing a decent local market to the moderate-income neighborhood surrounding the store. Few of our customers spend more than a couple of dollars on the machines when they come in to purchase goods, but it all adds up to provide a profit on a business that would otherwise lose money.

6. In approximately 1989, we decided to purchase approximately 20 video poker machines and lease them for use at other locations. Our customary arrangement was to allow the operator of the location to retain 50% of the profit from the machines, paying us the other 50%. The leasing of these video poker machines has remained a profitable business, supplying additional income to Westside Quik Shop, Inc.

7. In 1994, the South Carolina legislature passed legislation allowing each county to vote, on a county by county basis, whether to allow the operation of video poker machines in each respective county. The citizens of Greenville County voted to allow the continued operation of video poker machines in Greenville County. As a result of the referendum's results, I felt confident that video poker was here to stay (at least during my remaining productive years) in Greenville County. Consequently, Westside Quik Shop, Inc. decided to invest a substantial sum to upgrade our convenience store and video poker

business, in specific reliance upon the continued validity of video poker in Greenville, South Carolina.

8. For example, because a new state law required extensive upgrading of our underground gasoline tanks to comply with federal environmental regulations, in 1998 we undertook an extensive (and expensive) program to upgrade in accordance with state requirements. The total cost of these upgrades – over $120,000 – would have required us to close the business if we had not had video poker income to help defray the cost. We borrowed the money to make these improvements in direct reliance on the expectation that video poker would continue in Greenville, as the voters had decided. We cannot make the payments on our $230,000 mortgage on this property without the income from our video poker business.

9. Also in reliance on our ability to continue our video poker business, in 1997 we bought Dave's Grocery, a convenience store, located at 599 Old Hundred Rd., Pelzer, South Carolina, 29669, for $235,000. We leased the property back to David Leopard, and placed three of our video poker machines, on the premises. We purchased Dave's Grocery specifically because we could place the video poker machines there. Since the payment on the $200,000 mortgage of about $3,000 per month is twice the rent we receive from Mr. Leopard, it is only the income from the video poker machines which makes Dave's Grocery a profitable business venture.

10. Without video poker machines, both the Westside Quik Shop and Dave's Grocery are unprofitable, generating far less income than required to pay the loans and other expenses of the businesses. Should Westside

Quik Shop, Inc. be deprived of the income from our video poker business, we would lose both of these stores to foreclosure.

11. In 1998 the Department of Revenue established a requirement that all video poker machines be electronically connected to a central computer system, which was to be created by the State of South Carolina. None of the machines we owned at that time contained the computer electronics necessary to comply with this requirement. Consequently, for the exclusive purpose of complying with these new state regulations, Westside Quik Shop, Inc. purchased 18 new "Pot of Gold" video poker machines, at a cost of approximately $144,000. Seventeen of these machines have been installed, with one in storage. Although there is nothing wrong with our "Pot of Gold" machines, enforcement of Act 125 will render them virtually worthless, with only nominal salvage market value. At the time we purchased these new "Pot of Gold" machines, we had no reason to believe that the State would outlaw their use. To the contrary, had we been informed that the State would outlaw video poker without implementing the centralized computer system, we would never have purchased these new machines or ordered and installed the necessary phone lines required by the State to communicate with these machines.

12. Moreover, we have paid more than $80,000 to the State and local governments in the past two years in video poker machine licensing fees. At no time prior to the South Carolina Supreme Court's decision in October 1999 did any state or local official inform me that my entire business would become unlawful on July 1, 2000, and that my entire investment in these machines would

be lost. To the contrary, the State requirement for sophisticated, state-of-the-art machines led me to believe that our business would continue for the indefinite future.

13. I have read the May 8, 2000 statement of the Attorney General, stating his position that all video poker machines must be out of the state before midnight June 30, 2000, and that those of us involved with the Westside Quik Shop are subject to arrest, fine, and imprisonment for conducting business the same as we have since 1981. From his statement, I also understand that the State intends to destroy my new Pot of Gold machines, in which Westside Quik Shop, Inc has invested over $224,000 in purchase costs and government license fees. Should this occur, the financial ramifications for my family, Mr. Wright's family, and the three other employees of Westside Quik Shop, Inc. will be devastating. We will lose our businesses, our homes, and everything we own. I have already begun investigating the possibility of bankruptcy.

14. Westside Quik Shop, Inc. has always run an ethical and fair business, providing a valuable community service. The enforcement of Act 125 will destroy this business of 22 years, leaving me and my family with huge debts and no source of income. I request the intervention of this Court to save and protect us.

Further the deponent sayeth naught.

Ronald James White

SWORN TO BEFORE ME
This ___ day of May, 2000.

Notary Public for South Carolina
My Commission Expires: ___